Supreme Court, U.S.
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No. 01-945

In The

Supreme Court of the United States

T.S.,

Petitioner,

v.

INDEPENDENT SCHOOL DISTRICT NO. 54,
STROUD, OKLAHOMA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

ANDREA R. KUNKEL*
JERRY A. RICHARDSON
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Respondent, Independent School District No. 54 of Lincoln County, Oklahoma (the "Stroud School District"), respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari filed herein. Petitioner fails to allege any reason for invoking this Court's certiorari jurisdiction beyond his contention that the United States Court of Appeals for the Tenth Circuit erred in the decision of this case. Petitioner ignores Rule 10 of the Rules of the Supreme Court and fails to identify any reason comparable to the reasons set forth therein for this Court to exercise its discretion and grant a writ of certiorari. Because Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Petitioner's request for a writ of certiorari should be summarily denied.

Moreover, Petitioner is wrong in asserting that the Tenth Circuit erred in its disposition of this case. Based on Petitioner's failure to allege that he was denied a free appropriate public education ("FAPE"), and based on Petitioner's failure to challenge his graduation from high school, the Tenth Circuit correctly held that Petitioner's claim that he was wrongfully denied a due process hearing under the Individual with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA") was moot. In the absence of a claim that a student has been denied FAPE, procedural, technical defects are not actionable under the IDEA.

Because Petitioner offers no "compelling reason[ ]" for this Court to exercise its discretionary power to grant

a writ of certiorari, as required by Supreme Court Rule 10, and because the Court of Appeals correctly applied existing law to Petitioner's claim, Petitioner's request for a writ of certiorari should be denied.

Factual Background

During the 1998-99 school year, Petitioner was a senior enrolled in and attending the Stroud School District. Petitioner had been determined to be eligible for services under the IDEA and was on an individualized education program ("IEP").

On September 25, 1998, Petitioner submitted a due process hearing request against the Stroud School District, which the Oklahoma State Department of Education ("SDE") designated as DPH No. 1634. Petitioner alleged that the Stroud School District had denied him FAPE because his IEP failed to identify a weakness in typing and his preferred modifications for his Accelerated Senior English and Horticulture classes. SDE assigned the case to a hearing officer who subsequently decided DPH No. 1634 in favor of the Stroud School District. Pursuant to the procedures established by SDE, Petitioner appealed the hearing officer's decision to an administrative appeal officer. On April 1, 1999, the appeal officer entered his decision in DPH No. 1634, holding as follows:

> The Student's Individualized Education Program is appropriate without further modification and/or adaptations. The School has offered the Student a free appropriate public education consistent with the requirements of the Individuals with Disabilities Education Act as interpreted by the Court in [*Board of Education v.*

> *Rowley*, 458 U.S. 176 (1982)]. The Student's program, in the opinion of this Officer, exceeds the *Rowley* standard.

Petitioner did not appeal this decision.

During the spring semester of Petitioner's senior year, Petitioner's IEP team met with Petitioner and his parents twice, with the first meeting occurring on April 18, 1999. As a result of this meeting, an IEP dated April 19, 1999, was written. The April 19, 1999, IEP was essentially identical to the IEP that the SDE appeal officer had characterized as "exceed[ing] the *Rowley* standard." At these IEP team meetings, Petitioner and his parents had ample opportunity to discuss any concerns they may have had about Petitioner's readiness for graduation from high school.

Petitioner successfully completed all of his academic requirements at the Stroud School District and graduated with his class at the end of the 1998-99 school year. Petitioner subsequently enrolled in college and achieved a 3.6 grade point average during his first college semester. *Opinion*, p. 12 of Petition for Writ of Certiorari.

The last day of classes at the Stroud School District for the 1998-99 school year was May 19, 1999. At approximately 3:10 p.m. that day, Petitioner delivered a due process hearing request dated May 18, 1999, to the Stroud School District. The next day, the School District received another due process hearing request dated May 18, 1999, through the mail. In these due process hearing requests, Petitioner claimed that his April 19, 1999, IEP was insufficient and that the IEP team meeting had been improperly

conducted. Significantly, Petitioner did *not* contest his graduation from high school.

The Stroud School District asked SDE not to assign Petitioner's May 18, 1999, due process hearing requests to a hearing officer, but SDE designated the requests as DPH No. 1670 and assigned the matter to the same hearing officer who had heard DPH No. 1634. During a pre-hearing conference the Stroud School District reasserted its objection to a hearing. After allowing the parties an opportunity to brief the issue, the hearing officer concluded that Petitioner's graduation from the Stroud School District with a regular high school diploma terminated his eligibility for FAPE and the hearing officer therefore lacked jurisdiction. An administrative appeal officer appointed by SDE subsequently upheld the hearing officer's decision. Petitioner sought review in the United States District Court for the Western District of Oklahoma.

Proceedings Below

Upon review of the record, the district court found that at the time Petitioner submitted his due process hearing requests he had completed all requirements necessary for his secondary education. As such, he was no longer entitled to the protections and benefits of the IDEA and, in particular, he was no longer entitled to a due process hearing. The district court therefore held that the decisions of the hearing officer and appeal officer were not erroneous and that Petitioner's requests for a due process hearing were properly denied.

On appeal, the United States Court of Appeals for the Tenth Circuit concluded that neither it nor the district court had jurisdiction over Petitioner's claims and vacated the judgment of the district court. The Court of Appeals emphasized the "murkiness" of Petitioner's claims and observed that Petitioner's "only clear request is for a due process hearing." *Opinion*, p. 12 of Petition for Writ of Certiorari. Finding no merit in Petitioner's insistence that he was entitled to a due process hearing notwithstanding his failure to allege that he had been deprived of any substantive educational benefits, the court trenchantly commented:

> [Petitioner] apparently views a due process hearing as a sort of discovery device to identify possible substantive deprivations that he has no obligation to point to in advance. In the present circumstances, we think this is an unrealistic approach without some accompanying challenge to graduation for graduation deprived him of his right to a due process hearing. And [Petitioner] has not argued that he was not qualified to graduate or that procedural defects denied him FAPE. . . .

Id., p. 15. The Court of Appeals concluded that Petitioner's claims were moot. *Id.*, p. 18.

Petitioner timely filed a Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE WRIT

I.

The Court Should Not Grant Certiorari Based Solely on a Party's Assertion that the Court of Appeals Committed Error

The Justices of this Court have repeatedly stressed that this Court's certiorari jurisdiction is not merely a mechanism for the correction of perceived errors by the lower federal courts. "[A]s Rule 17.1 of the Rules of this Court makes plain, our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring). "[C]ertiorari does not provide . . . 'a normal appellate channel in any sense comparable to the writ of error,' for the Court must limit its jurisdiction to questions that have significance beyond the immediate case." *Adams v. Illinois*, 405 U.S. 278, 287 n.4 (1972) (Douglas, J., dissenting), quoting *Fay v. Noria*, 372 U.S. 391 (1963). "This Court's certiorari jurisdiction should not be exercised simply 'for the benefit of the particular litigants,' . . . but instead for the 'settlement of [issues] of importance to the public as distinguished from . . . the parties.' " *Sullivan v. Little Hunting Park*, 396 U.S. 229, 250 (1969) (Harlan, J., dissenting) (citations omitted). "[C]ertiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.' " *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J., dissenting), quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916).

Petitioner identifies no reason for this Court to grant certiorari herein beyond his argument that the case was wrongly decided by the Tenth Circuit. Petitioner offers nothing remotely comparable to the kind of reasons identified in Rule 10 of the Rules of the Supreme Court as implicating this Court's discretionary power of review. Petitioner does not suggest that the decision of the Court of Appeals is in conflict with that of another United States court of appeals on the same issue, conflicts with a decision by a state court of last resort, or has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

Because Petitioner has identified nothing about this case that warrants the exercise of this Court's certiorari jurisdiction, the Petition for Writ of Certiorari herein should be denied.

II.

The Court of Appeals Correctly Ruled that Petitioner's Claims Were Moot Based on His Failure to Contest His Graduation from High School or to Allege that He Was Denied FAPE

This Court should also deny Petitioner's request for a writ of certiorari because the Court of Appeals correctly concluded that Petitioner's claims were moot.

Citing *Board of Education of Oak Park v. Nathan R.*, 199 F.3d 377 (7th Cir. 2000), *cert. denied*, 531 U.S. 822 (2000), the Court of Appeals noted that if a student has graduated from high school and does not contest his graduation, the case is moot. *Opinion*, p. 12 of Petition for Writ of

Certiorari. The court observed that Petitioner's "only clear request here is for a due process hearing." *Id.* The court recognized that federal courts have jurisdiction to consider such a purely procedural claim "only if it is connected with [a claim for] substantive relief." *Id.*, p. 13. Although expressing doubt that Petitioner intended to challenge his graduation from high school, *id.*, p. 12, the court nevertheless thoroughly examined each of Petitioner's arguments to determine if he had stated a cognizable claim.

The court noted that Petitioner did not directly contest the propriety of his graduation, and it pointed out that the arguments that came closest to suggesting such a claim – specifically, the argument that all areas of his disability were not addressed by the goals and objectives of the April 19, 1999, IEP – were *not* advanced on appeal. *Id.*, p. 13. Instead, Petitioner claimed only that he should have received *notice* of his impending graduation. Yet Petitioner did not suggest that "this lack of notice rendered his graduation invalid." *Id.* The court concluded: "By failing to directly challenge the validity of his graduation, [Petitioner] essentially concedes both that the claimed procedural defect was harmless and that the appeals officer had no jurisdiction to hear his claim." *Id.*, pp. 13-14.

Federal courts have repeatedly held that technical procedural defects do not result in a violation of the IDEA if there is no substantive deprivation. *See, O'Toole v. Olathe Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998) (stating technical irregularities in IEP are not necessarily violative of the IDEA); *Urban v. Jefferson County School Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996)

(noting technical deviations from the requirements of the IDEA, such as the failure to include a statement of transition services, do not render an IEP entirely invalid); *Cordrey v. Euckert*, 917 F.2d 1460, 1467 (6th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991) (school's procedural failure to document parents' refusal to attend IEP meeting inconsequential); *Doe v. Defendant I*, 898 F.2d 1186, 1190-91 (6th Cir. 1990) (declining to "exalt form over substance" by holding that technical deviations from the IDEA's procedural requirements render an IEP invalid); *Burke Cty. Bd. of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (minor procedural faults of school board were insignificant since they did not cause the child to lose educational opportunity). The Tenth Circuit correctly concluded that Petitioner's allegation that he was denied "notice" of his impending graduation, without more, did not state a claim for denial of substantive educational benefits.

The Court of Appeals next considered Petitioner's claim that he was entitled to an "exit meeting" under Oklahoma law for an evaluation to determine whether graduation was appropriate. Noting that the regulation under the applicable section of the IDEA, 20 U.S.C. § 1414(c)(5), specifically states that "an evaluation is not required before a termination of benefits due to graduation with a regular high school diploma," the court expressed doubt as to whether Oklahoma law could be construed in the manner urged by Petitioner. *Opinion*, p. 14 of Petition for Writ of Certiorari, citing 34 C.F.R. § 300.534. Yet even if Oklahoma law so provided, the court concluded that "we still fail to see any substantive deprivation resulting from the alleged procedural defect." *Opinion*, p. 14 of Petition for Writ of Certiorari.

This identical issue was addressed in *Quaker Valley Sch. Dist.*, 30 Individuals with Disabilities Education Law Report (IDELR) 634 (SEA PA 1999). There, the parents of a 19-year-old high school graduate requested a due process hearing, claiming that their daughter's graduation was not valid and that she was still entitled to special education. The parents alleged, among other things, that the school failed to conduct a final IEP meeting before their daughter's graduation. In ruling in favor of the school, the appeals panel stated that "[student's] college application manifests her graduation desires, the prospects for which parents knew of through the IEP's provisions. . . . " *Id.* at 637. "Testimony of sufficient graduation credits then couples with parental knowledge and student desire to satisfy obvious regulatory intent while rendering harmless the error of not holding a memorializing IEP meeting." *Id.*

The record presented to the Court of Appeals established beyond doubt that Petitioner was prepared for, desirous of, and properly deemed eligible for graduation from the Stroud School District at the end of his senior year. More important, Petitioner made absolutely no claim that he was entitled to or should have been permitted to continue his secondary education at the Stroud School District or that the award of a regular diploma and his graduation from high school were inappropriate. In the absence of an allegation that he was deprived of some substantive educational benefit, the Court of Appeals correctly concluded that Petitioner's claim of a procedural mistake was insufficient to create a live case or controversy. *See, Urban*, 89 F.3d at 727 (observing that "[b]ecause the District's procedural violation did not

amount to a substantive deprivation . . . there was no violation of [student's] right to an appropriate education.").

The court next addressed Petitioner's claim that in the absence of an exit IEP meeting and notice of an impending change in placement, the School District should have convened a due process hearing under 20 U.S.C. § 1415(b)(6) to receive "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child. . . . " The court again noted that Petitioner alleged no substantive deprivation relating to the alleged procedural defect. Because Petitioner did not contend that he was unqualified to graduate or that any of the alleged procedural defects denied him FAPE, he failed to state an actionable claim. *Opinion*, p. 15 of Petition for Writ of Certiorari.

Before an administrative officer may proceed with a due process hearing request, the hearing officer must have subject matter jurisdiction. A due process hearing may be convened to hear evidence on issues involving the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. *See* 34 C.F.R. § 300.507(a). Implicit with the commencement of a due process hearing is the requirement that there be a *live case or controversy* involving a student. Under the IDEA, "[t]he obligation to make FAPE available to all children with disabilities does not apply with respect to . . . [s]tudents with disabilities who have graduated from high school with a regular high school diploma. . . . " 34 C.F.R. § 300.122(a)(3)(i).

Petitioner's requests for services clearly extended beyond his successful completion of a secondary school education. Indeed, even if his requests could be construed as alleging a denial of FAPE, it is well established that "the right to receive special education and related services – including transition planning and services – ceases when a student receives a high school diploma. . . . " *Novato Unified School District*, 22 IDELR 1056, 1064 (SEA CA 1995).

In *Novato*, the parents of an 18-year-old student with a serious emotional disturbance alleged that his school district denied him FAPE by failing to provide him adequate transition planning and services prior to awarding him a high school diploma. In addressing whether the parents were entitled to request a due process hearing after their child had graduated, the hearing officer in *Novato* made clear that "[t]he parents were correct in assuming that after the award of a diploma, [they] would not have had any right to demand services, to call for an IEP meeting, *or to request a due process hearing*." *Id.* at 1065 (emphasis added). *See Chuhran v. Walled Lake Consolidated Schools*, 839 F. Supp. 465, 473-74 (E.D. Mich. 1993), *aff'd*, 51 F.3d 271 (6th Cir. 1995) (Table) (stating that the successful completion of general graduation requirements in light of a student's IEP normally constitutes an adequate FAPE and forecloses further special education services under the IDEA); *Montgomery County Pub. Sch.*, 22 IDELR 754 (MD SEA 1995) (holding that although district failed to conduct a review meeting prior to graduation to include the foster parents in the final graduation decision and such failure amounted to a procedural violation of federal and state special education law, the violation did

not deny FAPE because the student reasonably benefitted from his education, received appropriate transition services, and was properly graduated).

Finally, the Tenth Circuit observed that even if it were willing to indulge in the "questionable assumption" that Petitioner was attempting to challenge his graduation from high school, Petitioner had "waived any argument that the school district denied him a FAPE because he has not made such a contention on appeal." *Id.* The court observed that it is "well settled that, without a claim that the FAPE was deficient, procedural defects are not actionable." *Id. See, Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1123 (10th Cir. 1999) (holding that a parent's claim for compensatory education was properly denied by the district court based on the parent's failure to contend that her son's IEP did not provide him FAPE).

The court flatly rejected Petitioner's argument that he was not in the position to assert a denial of FAPE because he could not know this without the aid of a due process hearing. The court noted that Petitioner "does not argue that the alleged procedural mistake was itself a deprivation of a FAPE[,] [t]hus he necessarily does not argue that the deprivation caused his graduation to be improper." *Id.* The court concluded that even if it were to "stretch the language" of Petitioner's brief, the court "still could not glean from it a claim of a substantive deprivation." *Id.*

The Court of Appeals also noted that Petitioner "makes a murky argument implying that he failed to obtain necessary 'transition services.' " The court pointed out that Petitioner did not identify what such services

might be and further observed that this was a request for prospective relief for which Petitioner should look to his post-secondary educational institution under the Rehabilitation Act, 29 U.S.C. § 794. *Opinion,* p. 16 of Petition for Writ of Certiorari.

This issue was addressed in *Daugherty v. Hamilton County Schools,* 21 F. Supp. 2d 765 (E.D. Tenn. 1998). In *Daugherty,* among other things, the plaintiff challenged an administrative law judge's ruling that he was not entitled to services under the IDEA beyond his successful graduation from high school. Significant to the court's ruling was the fact that the plaintiff did not contest his successful graduation from secondary school. *Id.* at 774. The court in *Daugherty* stated:

> Plaintiff failed to demonstrate his particular claim is anything more than a request for additional psychiatric, social, and emotional services beyond that already provided by the [school]. It is important that [plaintiff] does not contest the types or adequacy of the services he did receive from the [school]. Additionally, he did not overcome the facts of his successful graduation which is uncontroverted evidence his "learning process" is intact. Notwithstanding his completion of a secondary school education, [plaintiff] also failed to describe sufficiently the services he requested as the cause of his inability to receive a FAPE; the services he seeks focused primarily on non-educational aspects of his difficulties. To grant [plaintiff's] claim would extend [school's] financial liability beyond the dictates of the IDEA to provide an appropriate education.

Id. See, Chuhran v. Walled Lake Consolidated Schools, 839 F. Supp. 465, 473-74 (E.D. Mich. 1993), *aff'd,* 51 F.3d 271 (6th Cir. 1995) (Table) (noting that the successful completion of general graduation requirements in light of a student's IEP normally constitutes an adequate FAPE and forecloses further special education services under IDEA).

Finally, the court concluded that the question of the timing of Petitioner's due process hearing request – and whether the Stroud School District's obligations to Petitioner had ceased because Petitioner had completed all of the course work necessary to earn a regular diploma before his due process hearing request was received – was irrelevant because "nowhere in the district court or on this appeal has [Petitioner] explicitly contested his graduation or made a viable claim of entitlement to post-graduation relief. *Id.,* p. 17.

The Court of Appeals concluded by noting that even if it were to conclude that it had jurisdiction of Petitioner's claims, those claims would "be denied on the merits for the reasons we have set forth." *Id.,* pp. 17-18. Instead, however, the court determined "that the substantive basis for [Petitioner's] requests is so thin, and a possible challenge to his graduation so elusive, that we think the case is moot." *Id.,* p. 18.

The Court of Appeals' decision was correct, and this Court should deny Petitioner's request for the grant of a writ of certiorari.

CONCLUSION

For the reasons stated herein, Respondent Independent School District No. 54 of Lincoln County, Oklahoma, respectfully prays that Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

ANDREA R. KUNKEL*
JERRY A. RICHARDSON
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Counsel for Respondents

**Counsel of Record*